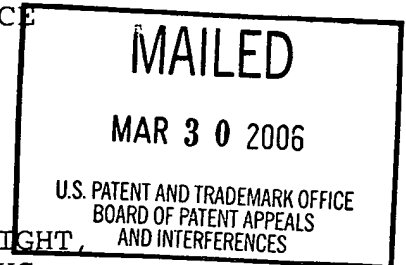


The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARTIN F. BERRY, KATHERINE G. HAIGHT,
DONALD C. WEBER, HAROLD L. MANTIUS,
LUTHER H. LEAKE, AND ROD SERRES



Appeal No. 2006-0510
Application No. 09/447,023

HEARD: March 23, 2006

Before WARREN, WALTZ and FRANKLIN, Administrative Patent Judges.
FRANKLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 70, 85, 86, 88-97, and 99-109. A copy of claims 70 and 97 are set forth below¹:

70. A cranberry food product comprising a blended juice, including:

a cranberry juice component that has a juice anthocyanin content of about 10 mg/100ml or less and

a component selected from another juice component, water, sweetener or acid,

wherein the juice component derived from cranberries having said anthocyanin content is the sole component from cranberries

¹ We use the version of the claims as provided by appellants in their Reply to an Order, filed on December 8, 2004.

Appeal No. 2006-0510
Application No. 09/447,023

in the blend.

97. A cranberry food product comprising a blended juice, including:

a cranberry juice component that has a juice anthocyanin content of about 10 mg/100 ml or less,

another juice component, and

a sweetener,

wherein the juice component derived from cranberries having said anthocyanin content is the sole component from cranberries in the blend.

The examiner has relied upon the following reference as evidence of unpatentability:

C.D. Chiriboga and F. J. Francis, "Ion Exchange Purified Anthocyanin Pigments as a Colorant for Cranberry Juice Cocktail", Journal of Food Science, Volumn 38, pages 464-467, (1973) (hereinafter referred to as "Chiriboga").

As an initial matter, we summarize the filing of certain papers, as follows. A non-final rejection was mailed on June 12, 2003. In response, appellants filed an appeal brief on September 8, 2003. The examiner mailed an examiner's answer on December 9, 2003. Appellants then filed a reply brief on February 11, 2004. An Order was mailed on September 24, 2004, indicating that the examiner failed to list the prior art and that claims 96 and 101 needed to be corrected. Appellants responded to the Order by filing an amendment to the claims on December 8, 2004. The examiner also responded by filing a second examiner's answer on December 23, 2004. In response, appellants filed a second reply brief on February 25, 2005, and stated that section 7 of the

second examiner's answer was incorrect and should read that the claims do not stand or fall together. In response, the examiner mailed a third examiner's answer on May 13, 2005, correcting section 7 of the answer, and again, on June 14, 2005. It is the copy of the June 14, 2005 examiner's answer to which we refer throughout this decision. It is the copy of the brief filed on September 8, 2003 to which we refer throughout this decision. It is the copy of the reply brief filed on February 11, 2004 to which we refer throughout this decision.

Claims 70, 85, 86, 88-97, and 99 -109 stand rejected under 35 U.S.C. §112, first paragraph (written description requirement).

Claims 70, 85, 86, 88-97, 99-109 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Chiriboga.

On page 4 of the brief, appellants state that the claims do notstand or fall together. We observe, however, that with respect to the dependent claims, appellants merely repeat the recitations of these claims. As such, we confine our discussion to independent claims 70 and 97. See 37 CFR § 41.37(c)(1)(vii)(September 2004); formerly 37 CFR § 1.192(c)(7)(2003). Also see Ex parte Schier, 21 USPQ2d 1016, 1018 (Bd. Pat. App. & Int. 1991).

We have carefully reviewed appellant's brief, and reply brief, and the examiner's answer, and the evidence of record. This review has led us to the following determinations.

OPINION

I. The 35 U.S.C. § 112, first paragraph, rejection of claims 70, 85, 86, 88-97, and 99-109 (written description requirement)

Beginning on page 2 of the answer, the examiner rejects all of the claims as failing to comply with the written description

requirement. On page 3 of the answer, the examiner states that the claims contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The examiner asserts that no particular disclosure is seen to support the phrase "wherein the juice component derived from cranberries having said anthocyanin content is the sole component from cranberries in the blend".

Appellants respond to this rejection on pages 9-11 of the brief. Appellants correctly point out that literal support is not a requirement for a written description. Brief, page 9. We note that the Federal Circuit has held that adequate written description support for an applicant's claim limitation exists even though it was not set forth "in haec verba" in the specification. In re Wright, 866 F.2d 422, 425, 9 USPQ2d 1649, 1651 (Fed. Cir. 1989). There is no requirement under Section 112 that the subject matter of a claim be described literally in the disclosure. In re Lukach, 442 F.2d 967, 969, 169 USPQ 795, 796 (CCPA 1971).

Also, in the case of In re Kaslow, 707 F.2d 1366, 217 USPQ 1089 (Fed. Cir. 1983), the examiner concluded that the claim as amended was not disclosed in the specification and that the claims were therefore drawn to new matter. The Federal Circuit affirmed, quoting the Board's statement of the law with approval:

The test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language.

Id. at 1375, 217 USPQ at 1096. See also, In re Wertheim, 541 F.2d 257, 262, 191 USPQ 90, 96 (CCPA 1976); In re Ruschig, 379 F.2d 990, 996, 154 USPQ 118, 123 (CCPA 1967).

In the instant case, the application as originally filed reasonably conveys possession of the subject matter wherein the juice component derived from cranberries having the anthocyanin content is the sole component from cranberries in the blend. Appellants refer to Table 3 on page 11 of the specification in support thereof. Brief, page 11. The text below Table 3, at lines 6-10 of page 11 of the specification, clearly indicates that Formula A uses a cranberry juice as the sole source of acid.

In view of the above, we therefore reverse the 35 U.S.C. §112, first paragraph (written description requirement) rejection of claims 70, 85, 86, 88-97, and 99-109.

II. The rejection of claims 70, 85, 86, 88-97, and 99-109 under 35 U.S.C. §103(a) as being unpatentable over Chiriboga

The issue before us, in this rejection, is claim interpretation. We note that we interpret claims by giving the terms thereof the broadest reasonable interpretation in their ordinary usage as they would be understood by one of ordinary skill in the art in light of the written description in the specification, unless another meaning is intended by appellants as established in the written description of the specification, and without reading into the claims, any limitation or particular embodiment disclosed in the specification. See, e.g., In re Am. Acad. of Sci. Tech. Ctr., 367 F.3d 1359, 1364, 70 USPQ2d 1827, 1830 (Fed. Cir. 2004); In re Morris, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); In re Zletz, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).

In the instant case, claims 70 and 97 each recites "a cranberry juice component that has a juice anthocyanin content of about 10 mg/100ml or less . . . wherein the juice component

derived from cranberries having said anthocyanin content is the sole component from cranberries in the blend".

The "cranberry juice component" can be cranberry juice from different sources of cranberry juice. See, for example, lines 23-30 on pages 2 of appellants' specification, wherein "about 40% or more of the cranberries have an acid profile as described herein . . ." This description indicates that a variety of sources of cranberries are used in forming the cranberry juice component. The claim does not limit the types of sources of cranberry juice that make-up the cranberry juice component. For example, one source could be from a cranberry juice source having an anthocyanin content outside the claimed range, and another source could be from a cranberry juice source having an anthocyanin content of 5mg/100ml, so long as the combined anthocyanin content is about 10 mg/100ml or less. The claim only limits the anthocyanin content of the cranberry juice component, but does not limit the anthocyanin content of individual sources of cranberry juice that make-up the component.

Appellants wish us to interpret the claims in a manner more limiting than the claims are written. Yet, the claims do not recite, for example, "a cranberry juice component wherein each source of cranberry juice used to form the cranberry juice component has an anthocyanin content of about 10 mg/100ml or less".

In view of the above claim interpretation, we determine that Chiriboga describes appellants' claimed invention because the cranberry juice cocktail listed in column 2 of Table 1 on page 464 of Chiriboga teaches a cranberry juice component (a blend of several sources of cranberry juice) having an anthocyanin content of about 10 mg/100ml or less. Chiriboga's cranberry juice cocktail (as pointed out by the examiner on page 4 of the answer) also includes sugar water. See page 465, first column, first

Appeal No. 2006-0510
Application No. 09/447,023

paragraph, last line of Chiriboga. We also agree with the examiner's position made on page 9 of the answer wherein the examiner recognizes that the values listed in column 2 of Table 1 of Chiriboga are values of a blend, but also recognizes that the cranberry juice component having the anthocyanin content is the sole component from cranberries. Accordingly, we determine that Chiriboga anticipates the claimed subject matter. Since anticipation is the epitome of obviousness, we will sustain the examiner's rejection. See In re Fracalossi, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982).

We have fully reviewed Harold Mantius' declaration. Appellants discuss this declaration in detail in both the brief and reply brief. This declaration is unpersuasive for the reasons we used in making our determinations herein.

In view of the above, we affirm the 35 U.S.C. §103(a) of claims 70, 85, 86, 88-97, and 99-109 as being unpatentable over Chiriboga.

VIII. Conclusion

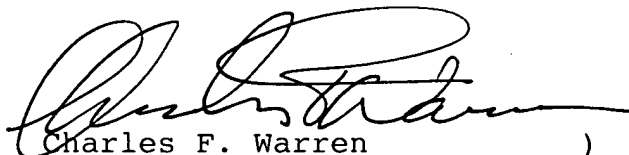
We reverse the 35 U.S.C. §112, first paragraph (written description requirement) rejection of claims 70, 85, 86, 88-97, and 99-109.

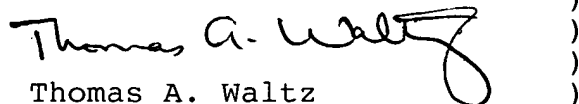
We affirm the 35 U.S.C. §103(a) rejection of claims 70, 85, 86, 88-97, and 99-109 as being unpatentable over Chiriboga.

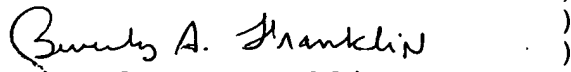
No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sept. 13, 2003; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat., Office 21 (Sept. 7, 2004)).

Appeal No.. 2006-0510
Application No. 09/447,023

AFFIRMED


Charles F. Warren)
Administrative Patent Judge)


Thomas A. Waltz)
Administrative Patent Judge)


Beverly A. Franklin)
Administrative Patent Judge)

BOARD OF PATENT
APPEALS AND
INTERFERENCES

Appeal No. 2006-0510
Application No. 09/447,023

Fish and Richardson PC
P.O. Box 1022
Minneapolis, MN 55440-1022